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No. 99-641

IN THE

Supreme Court of the United States

MICHAEL H. STEINHARDT,

Petitioner,

v.

UNITED STATES OF AMERICA
and REPUBLIC OF ITALY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Every argument in the brief in opposition is based on the assumption that the importation of the Phiale violated the National Stolen Property Act, 18 U.S.C. § 2314, *et seq.* ("NSPA"). However, the Court of Appeals did not reach that issue. Without a violation of the NSPA: (1) the United States had no power to seize the Phiale[1] even if Haber's customs broker had written on the customs entry form that the country of origin was Italy and the item was worth more than $1,000,000, and therefore under any standard of materiality, the Phiale was not imported "by means of" a false statement; (2) there is no question that petitioner is "wholly innocent" (Opp. Br. 16), and therefore entitled to due process protection with respect to the false statements on the customs entry form; and (3) the United States has no remedial purpose in returning the Phiale to Italy and therefore, under *United States v. Bajakajian,* 118 S. Ct. 2028 (1998), the forfeiture can only be punitive.

1. Unless the importation of the Phiale violated the NSPA, an issue the Second Circuit did not reach, there was no prohibition against its importation, regardless of whether or not the country of origin was Italy. The only legal authority relied on by the government and cited in the Customs Service Policy is the NSPA, as erroneously interpreted in *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977). Since the Second Circuit declined to decide whether that interpretation of *McClain* was correct or not, it is a bootstrap argument to rely on it as the basis for a claim of materiality. Without the *McClain* argument, there is no legal authority for the United States to seize the Phiale regardless of what was written on the form. Accordingly, the false statements could not be material under any standard.

1. Unless otherwise indicated, capitalized terms have the same meaning in this Reply as the same terms had in the Petition.

The government contends that the proper standard of materiality is whether or not the statement "has the potential significantly to affect the importation process or Customs Service operations (such as where it might reasonably prevent Customs from imposing an otherwise appropriate duty on the item), even if it could not affect whether or not the item would actually be admitted into the country." (Opp. Br. 11 (fn. omitted)). In this case, however, it is undisputed that there is no duty on art work. Accordingly, even under the government's preferred standard, the misstatement as to the country of origin was not material.[2]

Moreover, to reach its preferred standard, the government relies on cases interpreting the materiality

2. The government also argues incorrectly that the conflict between the Second Circuit's decision in this case and decisions by the Fifth and Ninth Circuits in *United States v. Corcuera-Valor*, 910 F.2d 198 (5th Cir. 1990), and *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982), is not a "true conflict" because of "earlier decisions" by those circuits on similar issues. (Opp. Br. 11.) Contrary to the government's assertions, however, neither of the earlier cases cited rejected a "but for" causation standard. Indeed, the Fifth Circuit's decision in *United States v. Steinfels*, 753 F.2d 3733 (5th Cir. 1985) specifically endorsed such a standard by holding that false statements relating to pollution control standards (as opposed to the statements relating to an exemption from duties pointed to by the government) were material because, without such statements, the automobiles at issue would have been denied entry. *Id.* at 377 (plaintiff "concedes that the automobiles would not have been released from Customs" if the DOT and EPA forms had not been falsely executed); *see* 19 C.F.R. § 12.80(b)(1). The Ninth Circuit's decision in *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978) is not to the contrary, holding simply that Section 542's "by means of language" requires a showing of materiality — a holding subsequently refined to include a "but for" analysis in the Court of Appeals' later *Teraoka* decision.

standard in statutes that do not contain the "by means of" requirement. (Opp. Br. 8 (citing *Neder v. United States*, 119 S. Ct. 1827, 1837 (1999); *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Kungys v. United States*, 485 U.S. 759, 770 (1988).) The government also minimizes the significance of the statutory language by arguing that the phrase "by means of" connotes only instrumentality, and not "but for" causation. (Opp. Br. 13.) By the government's standard, *any* false statement contained in a document submitted in connection with the importation of an object would satisfy the "by means of" requirement. (*Id.*) The flaw in that argument is that it renders the "by means of" requirement meaningless.[3]

2. The government's argument on due process makes two points. *First*, the government argues that petitioner may be entitled to recover his losses from the sellers based on the "Terms of Sale" document. (Opp. Br. 16.) It is undisputed, however, that petitioner is not a party to that document and was not even aware of it until discovery in this case. In any event, the due process rights of an innocent owner in connection with the forfeiture of his property cannot depend upon the possibility that he may have a remedy against the actual wrongdoers. Certainly none of the opinions in *Bennis* deemed it relevant whether Mrs. Bennis could sue her husband for her share of the value of the forfeited car. *See Bennis v. Michigan*, 516 U.S. 442 (1996).

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3. The government's dictionary definition of "by means of" does not further its argument. For an item to be imported "through the agency or instrumentality of" a false statement, it must be the case that in the absence of a false statement, the item could not have been imported. That is not the case here.

Second, the government cites to language in the district court opinion that the extent of petitioner's culpability is "unclear". (App. 48a.) However, the district court made that observation in connection with the NSPA issue, which the Second Circuit did not reach. It is undisputed that petitioner had nothing whatsoever to do with the statements contained in the customs entry forms.

3. The government's effort to distinguish *Bajakajian* is unavailing. *Bajakajian* held that where the only loss to the government is information, a forfeiture cannot be remedial, and is therefore necessarily punitive within the meaning of the Eighth Amendment. 118 S. Ct. at 2034. That is the case here.

The government argues that forfeiture here "does serve an important remedial purpose, namely the return of a valuable artifact to its country of origin in accordance with foreign law." (Opp. Br. 18.) That argument begs the question, because in the absence of a violation of the NSPA, the United States has no valid or legitimate interest in returning the Phiale to Italy.

In any event, the question of whether a statute has a remedial purpose cannot depend on the particular use to which the government, at its discretion, plans to put the forfeited property. After all, the result in *Bajakajian* would not have been different if the government had chosen to donate the Bajakajians' cash to the American Red Cross. Where, as here, the only harm to the United States is the loss of information, *Bajakajian* holds that the statute does not serve any general remedial purpose of the United States and forfeiture thereunder is necessarily punitive. 118 S. Ct. at 2034.

The government also seeks to distinguish this case from *Bajakajian* on the ground that *Bajakajian* involved a criminal forfeiture and this case involves an *in rem* forfeiture. (Opp. Br. 17-18.) However, four post-*Bajakajian* court of appeals decisions addressing the issue have applied the *Bajakajian* analysis in holding that the *in rem* forfeiture statutes involved are punitive.[4]

It is true, as the government argues, that in three of those four cases the court of appeals went on to hold that the forfeiture did not constitute an excessive fine. The Court of Appeals in this case held that the forfeiture was not punitive and therefore did not reach the question of whether it was excessive. However, the facts of this case present an even more compelling case for excessiveness than *Bajakajian*. Here, petitioner is wholly innocent of the wrongdoing that is the basis for the forfeiture. Moreover, the only harm to the United States, as in *Bajakajian*, is the loss of information which, as in *Bajakajian*, is excessive compared to the loss of an object worth over $1,000,000. Any harm suffered by the Republic of Italy is irrelevant, especially without a finding of a violation of the NSPA.

Contrary to the government's argument, this case is an excellent vehicle to address the fundamental issue of whether the *Bajakajian* analysis applies to an *in rem* forfeiture case. The issue is purely one of law, and the decision below that

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4. *Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998); *United States v. Real Property Known and Numbered As 415 East Mitchell Avenue*, 149 F.3d 472, 476-77 (6th Cir. 1998); *United States v. 3814 NW Thurman Street, Portland Oregon*, 164 F.3d 1191 (9th Cir. 1999); *United States v. 817 N.E. 29th Drive, Wilton Manors, Florida*, 175 F.2d 1304 (11th Cir. 1999).

the forfeiture was not punitive conflicts with post-*Bajakajian* decisions in four other circuits.[5]

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition, petitioner Michael H. Steinhardt's petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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5. The government is not helped by its argument that "[t]he lack of clarity in the record concerning the extent to which petitioner has already been compensated or is entitled to compensation for the forfeiture" makes this case "particularly unsuitable for balancing the amount of the forfeiture with the gravity of any underlying offense." (Br. in Opp. 19). Even if that fact were relevant to the Eighth Amendment analysis, which we dispute, the remedy for a lack of clarity in the record is to remand, not to affirm a grant of summary judgment.